LEE FOOK

v.

PP

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHAMAD ARIFF YUSOF JCA
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: S-05-94-2010]
5 MAY 2013

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Defence of legal insanity - Whether appellant was suffering from substance-induced psychosis - Whether appellant had necessary intention to commit murder within meaning of s. 300 Penal Code - Whether appellant legally insane - Penal Code, s. 85(2)(b) - Whether there was misdirection or failure to properly consider law or evidence by trial court*

CRIMINAL LAW: *Murder - Defence - Legal insanity - Whether appellant was suffering from substance-induced psychosis - Whether appellant had necessary intention to commit murder within meaning of s. 300 Penal Code - Whether appellant legally insane - Penal Code, s. 85(2)(b)*

The appellant was charged with the murder of the deceased under s. 302 of the Penal Code. The facts showed that the appellant had attacked the deceased with a *parang* at a recreational park, slashing the deceased's left leg and slashing the back of the deceased's neck. The appellant, PW9 and another person then got into a car and fled the scene. According to PW9, the appellant had warned PW9 not to inform anyone of the incident. The body of the deceased was found on the same day and according to the post mortem report by PW5, the cause of death was determined as the chop wound on the back of the neck. The Judicial Commissioner ('JC') found that there was a *prima facie* case against the accused for murder. The appellant took the stand and did not deny that he had slashed the deceased. However, in his defence, he raised the ground of legal insanity induced by intoxication or "substance-induced psychosis" ('SIP') due to his consumption of alcohol together with *syabu* in a fairly large quantity prior to his attack on the deceased. According to the appellant, his intention was just to "scare" the deceased because

A the appellant had learnt that the deceased was allegedly having an affair with his wife. The High Court, however, rejected the defence of the accused and concluded that this was "cold blooded murder". The appellant was accordingly convicted and sentenced to mandatory punishment of death. In this appeal, the appellant B had submitted that the JC had erred in fact and in law when he failed to consider, *inter alia*, that (i) the appellant was legally insane when he committed the offence; and (ii) that the expert report by the psychiatrists had indicated that he was suffering from SIP and that the appellant had no intention of murdering the deceased. C The appellant further submitted that the sentence passed was excessive and unjust.

Held (dismissing appeal; affirming conviction and sentence of High Court)

D **Per Mohamad Ariff Yusof JCA delivering the judgment of the court:**

(1) There was no misdirection or failure to properly consider the law or the evidence on the part of the trial court. The conclusions of the trial court were amply justified on the E evidence. Indeed the JC went beyond just considering the defence of insanity based on SIP by addressing himself on the question whether there could be said to exist grave and sudden provocation in law by reason of the accused's suspicion that the deceased had an affair with his wife. As far F as grave and sudden provocation was concerned, however, there was simply no factual foundation for it. (paras 26 & 27)

(2) It was proved beyond reasonable doubt that the accused had the necessary intention to commit murder within the meaning G of s. 300 Penal Code. Whilst it is the law under s. 85(2) of the Penal Code that intoxication shall be a defence, a sufficient factual foundation on the evidence must be established. The burden to prove legal insanity is on the accused to discharge on the balance of probabilities. The JC H came to strong findings of fact that the appellant had the intention to inflict the wound on the back of the head of the deceased. As stated by the court, "murder was on his mind." (paras 29 & 31)

I

(3) There was no credible medical evidence that the appellant was legally insane within the meaning of s. 85(2)(b) of the Penal Code at the time of the commission of the offence. He had the presence of mind to drive the car from his house to the recreation park, commit the crime, drive the car from the recreation park to his house and even saw it fit to warn and threaten PW9 not to inform anyone about the incident. These acts were not the outward acts of a legally insane man. Thus, the decision of the trial court was found to be sound and did not merit any judicial intervention. (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh dengan kesalahan membunuh si mati di bawah s. 302 Kanun Keseksaan. Fakta menunjukkan bahawa perayu telah menyerang si mati dengan parang di sebuah taman rekreasi, dengan mengelar kaki kiri si mati dan menetak belakang leher si mati. Perayu, PW9 dan seorang lagi telah kemudiannya memasuki kereta dan meninggalkan tempat kejadian. Menurut PW9, perayu telah memberi amaran kepada PW9 agar tidak memberitahu sesiapa mengenai kejadian tersebut. Mayat si mati telah dijumpai pada hari yang sama dan menurut laporan bedah siasat oleh PW5, punca kematian telah disahkan akibat luka yang terdapat di belakang leher si mati. Pesuruhjaya Kehakiman ('PK'') mendapati bahawa terdapat kes *prima facie* membunuh terhadap tertuduh. Perayu telah memberi keterangan dan tidak menafikan bahawa dia telah menetak si mati. Namun begitu, dalam pembelaannya, perayu telah membangkitkan alasan hilang akal di sisi undang-undang akibat kemabukan atau "bahan yang menyebabkan psikosis" ('SIP') disebabkan penggunaan alkohol bersama-sama dengan syabu dalam kuantiti yang agak besar sebelum serangannya terhadap si mati. Menurut perayu, niatnya hanyalah untuk "menakutkan" si mati kerana perayu telah mendapat tahu bahawa si mati kononnya mempunyai hubungan sulit dengan isteri perayu. Mahkamah Tinggi, walau bagaimanapun, telah menolak pembelaan tertuduh dan membuat kesimpulan bahawa ini adalah "satu pembunuhan kejam." Perayu dengan itu telah disabitkan dan dijatuhkan hukuman mati. Dalam rayuan ini, perayu menghujahkan bahawa PK telah khilaf dari segi fakta dan undang-undang apabila dia gagal mempertimbangkan, antara lain, bahawa (i) perayu hilang akal di sisi undang-udang apabila dia telah melakukan kesalahan itu; dan (ii) laporan oleh pakar psikiatri menunjukkan bahawa perayu mengalami SIP dan

A bahawa perayu tidak mempunyai niat untuk membunuh si mati. Perayu seterusnya menghujahkan bahawa hukuman yang dijatuhkan ke atasnya adalah berlebihan dan tidak adil.

Diputuskan (menolak rayuan; mengesahkan sabitan dan
B **hukuman Mahkamah Tinggi)**
Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Tiada salah arahan atau kegagalan untuk mempertimbangkan undang-undang atau keterangan dengan teliti oleh mahkamah
C bicara. Kesimpulan yang dibuat oleh mahkamah bicara telah dijustifikasikan dengan secukupnya. Sesungguhnya PK telah mengambil langkah yang lebih lanjut daripada hanya mempertimbangkan pembelaan hilang akal dari segi undang-
D undang berdasarkan SIP dengan menangani persoalan sama ada terdapat kewujudan provokasi berat dan mengejut dari segi undang-undang atas alasan syak wasangka tertuduh bahawa si mati telah mengadakan hubungan sulit dengan isterinya. Berkenaan isu provokasi berat dan mengejut, walau
E bagaimanapun, tidak terdapat asas fakta baginya.

(2) Ia telah dibuktikan melampaui keraguan munasabah bahawa tertuduh mempunyai niat yang diperlukan untuk melakukan pembunuhan dalam maksud s. 300 Kanun Keseksaan.
F Walaupun ia adalah undang-undang di bawah s. 85(2) Kanun Keseksaan bahawa kemabukan adalah satu pembelaan, asas nyata atas keterangan yang mencukupi harus dibuktikan. Beban membuktikan kehilangan akal dari segi undang-undang terletak pada tertuduh atas imbangan kebarangkalian. PK telah
G mendapati bahawa terdapat penemuan fakta yang kukuh bahawa perayu mempunyai niat untuk mencederakan belakang kepala si mati. Seperti yang dinyatakan oleh mahkamah, "pembunuhan adalah dalam fikirannya."

(3) Tiada keterangan perubatan yang kredibel bahawa perayu telah
H hilang akal dari segi undang-undang dalam maksud s. 85(2)(b) Kanun Keseksaan semasa dia melakukan kesalahan tersebut. Perayu mempunyai akal fikiran untuk memandu kereta dari rumahnya ke taman rekreasi tersebut, melakukan kesalahan itu, memandu kereta dari taman rekreasi ke rumahnya dan juga
I telah melihat keperluan untuk memberi amaran dan mengancam PW9 untuk tidak memberitahu sesiapa mengenai kejadian itu.

Tindakan-tindakan tersebut bukanlah tindakan seseorang yang telah hilang akal dari segi undang-undang. Oleh itu, keputusan mahkamah bicara didapati berasas dan tidak mewajarkan campur tangan kehakiman.

Case(s) referred to:
Aladin v. PP [1964] 1 LNS 4 FC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Bratty v. AG for Northern Ireland [1961] 3 All ER 523 ***(refd)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
M'Naghten's Case [1843-60] All ER Rep 229 ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
PP v. Dato Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Jong Chin Chin [1995] 1 LNS 299 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
R v. Sullivan [1983] 2 All ER 673 ***(refd)***
Ram Kumar v. State AIR 1970 60 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1), (2), (3), (4)
Penal Code, ss. 85(2)(a), (b), 86(2), 300(d), 302

Penal Code [Ind], s. 304

For the appellant - Mohd Fauzi Formusa; M/s Ngui & Assocs
For the respondent - Siti Rafidah Zainuddin; DPP

[Editor's note: For the Court of Appeal judgment, please see PP v. Lee Fook [2010] 1 LNS 204]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamad Ariff Yusof JCA:

[1] The appellant in this appeal was tried and convicted of murder and punishable under s. 302 of the Penal Code and accordingly sentenced to the mandatory punishment of death. We dismissed the appeal since we found the judgment of the High Court, in our opinion, sound in terms of the assessment of the evidence and the law both at the conclusion of the prosecution case as well as at the conclusion of the trial. We now provide our reasons.

A **The Charge**

[2] The charge preferred against the accused/appellant was as follows:

> B That you, on the 24th day of July 2008, at about between 4.00 p.m. to 5.00 p.m., at Taman Rekreasi Bambangan, Kampung Modsiang, Jalan Tambunan in the District of Penampang in the State of Sabah, did commit murder by causing the death of one LAM AH SANG @ FOO AH SANG (M) Identity Card No. 570607-12-5057 and that you have thereby committed an C offence punishable under section 302 of the Penal Code.

[3] The prosecution called 14 witnesses for the prosecution. At the close of the prosecution case, the High Court found a *prima facie* case established and called for the accused to enter his defence. The defence called two witnesses. The accused elected D to give his evidence on oath. The second defence witness was a psychiatrist from Hospital Mesra Bukit Padang, Kota Kinabalu who had prepared a medical report on the accused, which medical report was received in evidence as exh. "D1".

E **[4]** The learned Judicial Commissioner found the charge of murder against the accused proven beyond reasonable doubt at the conclusion of the trial.

The Background Facts

F **[5]** The detailed background facts have been provided in the grounds of judgment of the High Court. It suffices for the present purpose to summarise the salient facts for this appeal.

[6] On the day mentioned in the charge the accused had invited G PW9, a friend of his, to his house. According to PW9 he was invited to come over to the house since the accused was having problems. When PW9 arrived there, a Filipino man (Ricky) was already there with the accused. They then smoked syabu (methamphetamine) together. Another person (described as a H "Bengali" by the name of Ibrahim by PW9) joined them later. The accused asked the Bengali to telephone the deceased and to invite him over, which the Bengali did. The Bengali left them thereafter. PW9, Ricky and the accused also drank liquor. The deceased arrived shortly and joined them in smoking syabu.

I

[7] All three were then asked by the accused to accompany him to look for a friend of his. The four then went out in a car driven by the accused, with the accused and the deceased in front, and PW9 and the Filipino at the back. They stopped by Taman Rekreasi Bambangan along the riverside. All alighted from the car and proceeded to collect some stones from the river as requested by the accused. The accused had the car boot open. As PW9 and the deceased was chatting near the car after having placed the river stones they had collected in the car boot, the accused suddenly approached the deceased with a parang. Asking the deceased whether the parang was sharp, the accused then slashed the deceased's left leg. This was almost immediately followed by a slash on the back of the deceased's neck. The deceased fell onto the ground. The accused, PW9 and the Filipino then got back into the car and left the scene. According to PW9 he could hear the deceased pleading "tolong tolong" in a low voice. At the time of the attack on the deceased, the accused was, according to PW9, fierce and 'serupa mahu makan orang.'

[8] The car, still driven by the accused, proceeded back to the accused's house. PW9 alighted from the car in front of the house and according to this witness, "Saya tidak menoleh balik hanya terus lari dari rumah Along". He did not relate to anyone about the incident because he was warned by the accused not to inform anyone about the incident with a threat that if he did "dia akan menetak saya juga".

[9] The body of the deceased was found at the same spot on the same day. According to the post mortem report by PW5 from the Department of Forensics Queen Elizabeth Hospital, there were two wounds on the body. One was an 18cm wound "on the back of the neck cutting the deceased neck muscle and cervical vertebra exposing the spinal cord". The other was "an incise wound" on the left leg. The cause of death was determined as the chop wound on the back of the neck. There was no injury to the hands of the deceased.

Decision On *Prima Facie* Case

[10] From the notes of evidence it was clear that the learned Judicial Commissioner had conducted a maximum evaluation of the prosecution evidence in finding there was a *prima facie* case against the accused for murder under s. 300 of the Penal Code

consistent with the statutory requirements under s. 180(1), (2), (3) and (4) of the Criminal Procedure Code. In particular, the court had properly addressed the requirements of sub-s. (4) in considering whether the prosecution had adduced credible evidence proving each ingredient of the offence of murder "which if unrebutted or unexplained would warrant a conviction".

[11] The learned Judicial Commissioner referred in particular to *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 and the decision of the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301 and *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, we note, were also canvassed before the court.

[12] In finding there was a *prima facie* case, His Lordship stated in the grounds of judgment, *inter alia*, the following:

> In deciding whether the prosecution had established a *prima facie* case I had applied the test laid down by the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 which is as follows:
>
> > Put shortly, what the trial court is obliged to do under s. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? ... If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent he must be convicted. If the answer is in the negative, then he must be acquitted.
>
> On the evidence before the court, it is clear to me that a *prima facie* case had been established against the accused at the close of the prosecution's case. I am satisfied that every element of the charge has been proved by the prosecution which if unrebutted would warrant the accused's conviction. When one chops another person's neck, the intention must be to cause his death.

[13] We found this reasoning and finding sound and fully agree with the same.

The Defence Arguments

[14] As indicated earlier, the defence called only two witnesses. The accused took the stand and did not deny he slashed the deceased on the leg and on the neck. In this appeal the only real

ground raised was legal insanity induced by intoxication or "substance-induced psychosis" ("SIP"). The accused did not deny he had consumed alcohol together with syabu in a fairly large quantity prior to driving to the recreation park which led to the fatal attack on the deceased. The motive was supplied by the accused himself when he testified that he had learnt from a friend that the deceased was having an affair with his wife when he was imprisoned, and he wanted "to teach Lam Ah Sang a lesson". He said his intention was just 'to scare' the deceased when he assaulted him. With this intention he had struck the deceased's leg, but never intended to hit the deceased's neck. According to the accused, after he had hit the deceased's leg, the deceased tried to punch him. He tried to hit the deceased's hand with the parang but hit his neck instead. He was asked during examination-in-chief how he felt before driving to the recreation park, since PW9 had described him as seeming to be "bingung dan gila" at that time. The pertinent parts of his examination-in-chief went as follows:

Q. When you hit the victim did you still feel headache?

A. Yes.

Q. Did the headache stop when you reached home?

A. No.

Q. Then did you take any drugs?

A. No. I just lied on the bed.

Q. Did you understand that drugs here mean syabu?

A. Yes I understand.

Q. Before you went to the taman you were at the house taking syabu. Did you know that you seemed to be "bingung and gila" as averred by Foo Pow Choy?

A. No I did not know that.

Q. At that time how did you feel?

A. I did not know about it.

Q. You did not know or you did not how to describe?

A. I do not know how to describe.

A Q. Can you try your best to describe how you felt at that time?

A. I do not know how to describe.

Q. The what was in your mind then?

B A. It was empty nothing to worry.

(See pages 178 and 179 of the Appeal Record)

[15] See also pp. 175 and 176 of the appeal record, where the accused said in examination-in-chief:

C Q. When did you realize that you want to teach the victim a lesson?

A. After I did not sleep for more than 10 days. So I look for Foo Pow Choy to help me to teach the victim a lesson
D together because I was afraid of the victim and did not dare to find him by myself.

Q. On that day, what is the quantity of drugs that you had taken?

E A. More than one set.

Q. How did you feel when you went out to the recreation park?

A. When I reached the recreation park I was having a headache and the shadows because I did not sleep for more than 10
F days.

Q. Did you hear any sound?

A. No.

G …

Q. After coming back from the riverside what did you do?

A. Ricky and Lam Ah Sang went back first. I was behind them. I saw Ricky and Foo Pow Choy did not dare to see me.
H Only Lam Ah Sang was staring at me while smoking. I expect Ricky and Foo Pow Choy to help me to teach Lam Ah Sang a lesson but they did not dare to look at me. So Lam Ah Sang and I looked at each other and I was scared of Lam Ah Sang. So I was trying to find weapon around me and I found a parang at the car bonnet. So I took the
I parang and walked towards Lam Ah Sang and I wanted to

scare him. So I swung the parang at his leg and I hurt his leg. Lam Ah Sang tried to punch me so I tried to hurt his hand but I hit his neck. So Lam Ah Sang fell to the ground and asked for help saying "tolong tolong" and I panicked. So I got into the car and went back home by driving slowly.

Q. When you drove away from the scene what were you thinking?

A. Nothing, just panicked and felt dizzy and tired.

Q. Did you regret for what you had done at the park?

A. I did not know why the wound was so deep. It was only a small cut when I saw the victim fell to the ground.

Substance-Induced Psychosis

[16] The medical report by DW2 contained a definition of substance-induced psychosis which read:

> Substance Induced Psychosis is defined as prominent psychotic symptoms (i.e., hallucinations and/or delusions) determined to be caused by the effects of a psychoactive substance is the primary feature of a substance-induced psychotic disorder. A substance may induce psychotic symptoms during intoxication (while the individual is under the influence of the drug) or during withdrawal (after an individual stops using the drug)

[17] The medical disorder described as substance-induced psychosis was thus explained as a medical condition which exhibits prominent psychotic symptoms of hallucinations and/or delusions.

[18] The accused was admitted for psychiatric evaluation during his remand, and was observed to have "auditory hallucinations whereby he heard voices which he could comprehend" which were at times "clear and degrading him". See p. 4 of the medical report, para. 2.

[19] Based on observations post-admission, the accused was diagnosed to have substance (methamphetamine) induced psychosis and was treated with antipsychotic medication. The medical report stated:

> The diagnosis of substance induced psychosis was arrived based on the temporal relationship of the psychotic symptoms such as hallucinations in the patient and his continuous excessive use of

A methamphetamine or abrupt succession of it. Mr. Lee has described similar symptoms in the past when he used excessive methamphetamines (syabu) or abruptly stopped using it.

[20] It is to be noted that the medical report also stressed the following:

B

> Mr Lee Fook admitted that he had planned to teach the victim a lesson and not to kill him even before he took methamphetamines (syabu) excessively. The intake of methamphetamines made him feel more confident to carry out the alleged act and worsened the
C suspicion that the victim had an affair with his wife. The auditory hallucinations which are described during his admission to Hospital Mesra was not present at the time of the incident and he denied that he was influenced by other psychotic symptoms during the alleged offence. (See page 5 of the Medical Report)

D **[21]** It thus appeared from the medical report that the accused himself admitted to DW2 that he had not experienced auditory hallucinations or other psychotic symptoms at the time he committed the alleged offence.

E **Decision At Conclusion Of Defence Case**

[22] After evaluating the explanation provided by the defence, the court rejected the claim of the accused that he had accidentally chopped the deceased's neck. The court also rejected the defence of substance induced psychosis arising from the consumption of
F drugs and alcohol which allegedly negated the intention to kill the deceased, by finding that the argument flew in the face of the evidence. The learned Judicial Commissioner concluded, "This was cold-blooded murder pure and simple."

G **[23]** The learned Judicial Commissioner addressed the medical evidence which he found to be consistent with PW9's evidence, noting that in the ordinary course of events it was just not possible for the deceased to try to punch the accused after being slashed on the left leg, especially when the accused was armed
H with a parang. It was not lost on the trial judge that this explanation by the accused was not put to PW9 during cross-examination, although the trial judge also rightly noted, on the basis of *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, that this failure of not putting the case to the prosecution witness did
I not absolve the prosecution from having to prove its case beyond reasonable doubt.

[24] The court held:

> I reject the accused's claim that he had accidentally chopped the deceased's neck. I have no doubt that when the accused brought the deceased to the recreation park murder was on his mind. The parang in the bonnet was intended weapon. It is obvious that the deceased was brought there to be executed ...
>
> It is also the defence case that the accused was legally insane at the time he chopped the deceased neck. However learned counsel did not even bother to refer to the expert evidence of the psychiatrists (DW 2) in his submissions. This is understandable because there is absolutely nothing in DW 2's evidence to support the defence of insanity. On the contrary his evidence clearly shows that the accused was not suffering from any infirmity of the mind when he killed the deceased.
>
> Counsel submitted that the accused was likely to be suffering from substance induced psychosis due to consumption of drug and alcohol at the time of the killing so that when he attacked the deceased he could not have had the intention to kill him. With due respect, this argument lies in the face of the evidence. The undisputed fact is that when the accused drove to the recreation park he did not show any sign of abnormality. He was driving and talking normally along the way. More significantly before he put his nefarious plan into action he asked the three men to collect stones from the river and to put them in the boot of his car. In my view this was a pretext to allow the boot to remain open to facilitate quick access to the parang.
>
> After the killing the accused himself drove the car home and when they reached home he warned PW 9 not to tell anybody about the incident. An insane person would not have the presence of mind to try to avoid the consequences of this criminal act. This is clear proof that the accused was not insane, legally or otherwise at the time he chopped the deceased's neck. I am not satisfied the defence of insanity has been proved on the balance of probabilities, if at all such defence is available to the accused. This was cold-blooded murder pure and simple. (See pages 10 and 11 of the grounds of judgment of the learned trial judge.)

The Grounds In The Petition Of Appeal

[25] The appellant/accused raised five grounds in his petition of appeal. These were:

> 1. The learned Judicial Commissioner has erred in fact and in law when he failed to consider that the Appellant was legally insane when he committed the offence;

2. The learned Judicial Commissioner has failed to take into consideration the fact that the expert report by the psychiatrists (DW 2) has still indicated that he was suffering from substance induced psychosis and that the Appellant never had intention to murder the deceased;

3. The learned Judicial Commissioner failed to take into consideration that the Appellant had never intended to cause any bodily injury based on the point that the first injury was on the leg which showed that the Appellant never intended to strike at the vital or dangerous spot on the body of the deceased;

4. The learned Judicial Commissioner failed to consider that the element of an intention to inflict particular bodily injury, that is to say, that it was not accidental or unintentional, or that some kind of injury was intended was not beyond reasonable doubt proven by the prosecution;

5. The learned Judicial Commissioner failed to take into consideration the testimony of PW 9 as regards the mental state of the Appellant when he committed the act;

6. In any event, the sentence was excessive and unjust to the Appellant. The learned Judicial Commissioner should reduce the charge under section 304 of the Penal Code.

[26] We could not agree with the arguments of the appellant. They had no merits in the full circumstances of the case. We could not find any misdirection or failure to properly consider the law or the evidence on the part of the trial court. The conclusions of the trial court were amply justified on the evidence. Indeed the learned Judicial Commissioner went beyond just considering the defence of insanity based on substance-induced psychosis by addressing himself on the question whether there could be said to exist grave and sudden provocation in law by reason of the accused's suspicion that the deceased had an affair with his wife, and thus he had intended to teach the deceased a lesson.

[27] As far as grave and sudden provocation was concerned, there was simply no factual foundation for it, and it was not even raised by counsel for the defence as part of the defence case. We could not fault the learned Judicial Commissioner for being extra-vigilant in his assessment of the evidence and the law. He properly directed himself on the law and cautioned himself that even where

the court rejected the accused's explanation, it must still not convict unless that explanation had not raised a reasonable doubt in the mind of the judge as to the guilt of the accused (*Mat v. PP* [1963] 1 LNS 82; [1963] 1 MLJ 263).

[28] Counsel for the appellant in addressing the law in relation to the defence of legal insanity and substance-induced psychosis, made copious reference to cases such as *Aladin v. PP* [1964] 1 LNS 4; [1964] 1 MLJ 345, *PP v. Jong Chin Chin* [1995] 1 LNS 299; [1995] 4 MLJ 300, *Yeoh Ah Seng v. PP* [1967] 1 MLJ 231, *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359; [2007] 2 MLJ 130, *R v. Sullivan* [1983] 2 All ER 673, *Bratty v. AG for Northern Ireland* [1961] 3 All ER 523, *Ram Kumar v. State* AIR 1970 60, and of course the illustrious decision in *M'Naghten's Case* [1843-60] All ER Rep 229. *Ram Kumar*, *supra*, is somewhat similar on the broad facts. In this Indian case, the accused and the deceased had gone for a picnic altogether and "were engaged in merry-making". They drank liquor. The deceased was shot by the accused in broad daylight, without any motive or enmity. A defence of intoxication was raised, and the court there held there was a reasonable doubt whether the appellant had either the intention of killing the deceased or the intention of causing him such bodily injury as was likely to cause his death. The court held: "Intention requires something more than a mere foresight of the consequences. It requires a purposeful doing of thing to achieve a particular end ... The noun "intention" ... is used to denote a state of mind of a man who not only foresees but also desires the possible consequences of misconduct ..." (at p. 70 of the report). In this appeal, counsel for the defence attempted to argue that the accused could not have had the requisite intention to commit murder arising from the substance induced psychosis. It is to be noted that even in *Ram Kumar*, *supra*, the court ultimately found liability on the basis of the lesser offence under s. 304 of the Indian Penal Code since there was no room for doubt that the appellant must have had the "knowledge" that he was doing an act which was likely to cause the death of the deceased.

[29] It is axiomatic that each case must be decided on its peculiar facts against the background of the governing law. On the facts of this appeal, it was proven beyond reasonable doubt that the accused had the necessary intention to commit murder within

A the meaning of s. 300 of our Penal Code. The inter-relationship between s. 300 and ss. 85 and 86(2) (the latter dealing with the defence of intoxication) has been dealt at length by our Federal Court in *Kenneth Fook Mun Lee v. PP*, *supra*, where the Federal Court held:

B

> ... s. 82(2) only affects those offences which require intention specific or otherwise, and excludes other types of *mens rea*. But since cl. (d) involves merely knowledge and not intention, it is therefore not within the ambit of s. 86(2). Put it in another way, intoxication is irrelevant in securing a conviction for murder if
C knowledge as per cl. (d) is proved beyond reasonable doubt by the prosecution. Such conclusion may appear to be preposterous. But that appears to be the position of the law for now ..." (at page 147 of the Report)

D **[30]** To quote s. 300:

> 300. Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) If the act by which the death is caused is done with the
E intention of causing death;
>
> (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> F (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause
G death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[31] Whilst it is the law under s. 85(2) that intoxication shall be a defence "if the person charged at the time of the act or omission
H complained of did not know that such act or omission was wrong or did not know what he was doing" and "(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person" or "(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the
I time of such act or omission", a sufficient factual foundation on

the evidence must be established. It is well accepted that the burden to prove legal insanity is on the accused to discharge on the balance of probabilities. The learned Judicial Commissioner came to strong findings of fact that the accused/appellant had the intention to inflict the wound on the back of the head of the deceased. To this extent, it was not necessary to rely on s. 300(d) and the element of "knowledge" as opposed to "intention". As stated by the court, "murder was on his mind". There was no credible medical evidence that he was legally insane within the meaning of s. 85(2)(b) at the time of commission of the offence. He had the presence of mind to drive the car from his house to the recreation park, commit the crime, drive the car from the recreation park to his house and even saw it fit to warn and threaten PW9 not to inform anyone about the incident. These acts are not the outward acts of a legally insane man.

[32] We therefore found the decision of the trial court sound and did not merit any judicial intervention.

Conclusion

[33] We dismissed the appeal by a unanimous decision and affirmed the conviction and sentence of the High Court.